MOTION FILED
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RECORD AND BRIEFS

No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* ACT THE APP ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amici curiae, ACT | The App Association ("App Association"), respectfully moves for leave to file the attached brief in support of the Petition for a Writ of Certiorari. Amici timely notified counsel for Petitioners and Respondents of their intent to file a brief in support of Petitioners and requested counsel's consent to the filing of the brief. Petitioners' counsel consented to Amici filing their brief. Respondents' counsel advised Amici that they opposed the request.

The App Association is an international grassroots advocacy and education organization representing more than 5,000 small app[1] developers and technology firms. It is the only organization focused on the needs of small business innovators from around the world. The App Association advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

The App Association has participated as an *amicus curiae* to the Supreme Court and other courts in cases related to antitrust and technological innovation. *See, e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

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1. An app is shorthand for application: in today's parlance, it refers most commonly to software applications running on mobile devices.

Technological innovation plays a critical role for our members and improving the welfare of consumers; therefore, the App Association has a keen interest in ensuring federal antitrust law is properly applied to the dynamic industries and innovative technologies that drive the app ecosystem. The App Association's members utilize app platforms to distribute innovative products and services to billions of their customers around the globe. If the Ninth Circuit's ruling stands, it will directly impact developers' ability to provide their services by breaching the viability of the agency-sale relationship with app platforms and sovereignty of our members' property within their app. Accordingly, the App Association respectfully requests leave to file a brief in support of Petitioners.

Dated: September 6, 2017

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

ACT | The App Association ("App Association") is an international grassroots advocacy and education organization representing more than 5,000 small app[2] developers and technology firms. It is the only organization focused on the needs of small business innovators from around the world. The App Association advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

The App Association has participated as an *amicus curiae* to the Supreme Court and other courts in cases related to antitrust and technological innovation. *See, e.g., Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). Technological innovation plays a critical role for our members and improving the welfare of consumers; therefore, the App Association has a keen interest in ensuring federal antitrust law is properly applied to the

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1. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Petitioner provided written consent in this appeal on August 22, 2017, and respondent has refused to provide its consent to the filing of this brief. The Petitioner's consent has been filed with the Clerk's office.

2. An app is shorthand for application: in today's parlance, it refers most commonly to software applications running on mobile devices.

dynamic industries and innovative technologies that drive the app ecosystem. The App Association's members utilize app platforms to distribute innovative products and services to billions of their customers around the globe. If the Ninth Circuit's ruling stands, it will directly impact developers' ability to provide their services by breaching the viability of the agency-sale relationship with app platforms and sovereignty of our members' property within their app.

SUMMARY OF ARGUMENT

The App Association urges the Court to grant the Petitioner's petition for cert on the basis that the Respondent's case relies on the Ninth Circuit's misguided assumption that a consumer's purchase of an app through the Petitioner's platform constitutes a direct purchase from the Petitioner exclusively; instead, the Petitioner provides a platform which facilitates our ability to sell our apps to customers. As an association that represents actual app companies that utilize the iTunes, Google Play, and other distribution channels/platforms, we find the Respondent's characterization of the relationship between platforms and app developers to be factually inaccurate and self-serving. App companies choose the distribution mechanism or platforms, choose the pricing, and even the monetization methodology for their applications. In fact, roughly 90 percent of apps made available on the iOS platform[3] are free. Sarah Perez, *Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry*, TechCrunch (Jul. 18,

3. This brief uses this term to describe Petitioner's operating system and platform.

2013), https://techcrunch.com/2013/07/18/paid-apps-on-the-decline-90-of-ios-apps-are-free-up-from-80-84-during-2010-2012-says-flurry/.

The Petitioner issues a 30 percent fee on apps that have an upfront cost or provide in-app purchases. In the context of a subscription, for each year thereafter, the fee is lowered to 15 percent, yielding an 85 percent profit for the app developer. Apple, *App Store Review Guidelines* (last visited Aug. 29, 2017), https://developer.apple.com/app-store/review/guidelines/#payments (App Store Guidelines). For that fee, our member companies benefit by reducing costs, including credit card collection record maintenance, third-party validation and other trust mechanisms, including hiring external publishers, and finally a trusted framework for consumers. In this case, the Respondent has attempted to apply "old" economy principles without appreciating the complex and nuanced relationship between app developers and platforms.

Moreover, the Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner incorrectly assumes the Petitioner possesses ownership rights in app developers' apps. This interpretation suggests that, if the Petitioner owns rights to an app developer's app, then the app developer would not be entitled to any profit from the consumer. This is wholly inconsistent with the way in which the app developer and the Petitioner interact. Within this relationship, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee in exchange for the use of the Petitioner's platform. Aside from this fee, the Petitioner has no ownership rights to the app. In addition, app developers are permitted to provide their apps on platforms not owned by the Petitioner,

unencumbered by the Petitioner. All creative rights solely belong to the app developer and are uninhibited by the Petitioner. Moreover, when a consumer signs a "terms of service agreement" for each app he or she purchases, the app's developer maintains sole responsibility for any breach of those terms.

ARGUMENT

I. App Stores and Small Business App Developers Rely on Procompetitive Agency Sale Relationships with App Stores to Succeed in the Market

The app ecosystem has developed alongside the rise of the smartphone and has experienced substantial growth in its less than ten years of existence. As outlined in our annual State of the App Economy report, small-business entities are leaders in the $143 billion app ecosystem that has revolutionized the software industry and influenced every sector of the economy. Brian Scarpelli, Nick Miller, & Roya Stevens, *State of the App Economy*, ACT | THE APP ASSOCIATION (2017) http://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf. To facilitate the rise of the internet of things (IoT), an encompassing concept where everyday products use the internet to share data collected from sensors, trusted and curated app stores will be vital to providing the apps that serve as the interface for IoT devices. The opportunities and potential for IoT will hinge on the app economy's continued innovation, investment, and growth.

The inaccurate reasoning of the Ninth Circuit asserts ambiguity as to from whom the consumer is buying. When purchasing apps from any platform, the consumer is the

app developer's customer, not the platform's. We proffer a descriptive account on how platforms have served as a helpful access point for our members in reaching their customers to best establish this point. When mobile apps first became available, there were not centralized, organized platforms where consumers could easily find and discover their desired app. App developers had to perform myriad tasks before bringing their product to market. Developers not only had to write the code for the app itself, but they also had contract for or develop their own website, hire third-parties to handle financial exchanges, including credit card transactions, and work with contracted services, potentially including publishing houses on promotions and advertisements to build up consumer trust in their respective product. All of these steps cost our members time and money – and, more importantly, were not core competencies. Today, app developers use platforms as a one-stop shop to handle distribution and any collection of any charges and this enables app companies to access consumers more easily, while still maintaining the ownership of their products and maintain a relationship with our customers. Thus, platforms serve as an incredible, resource-saving alternative to other modes of interaction with consumers (*e.g.*, the World Wide Web).

Beyond the benefit for our membership directly, the App Association has long believed that agency-sale relationships are procompetitive arrangements that lower costs for consumers. They allow independent app developers to set their prices based on their business models, while allowing the app platform to retain a nominal fee for providing app developers with access to a broad set of customers, promoting a virtuous cycle of innovation.

Brief for ACT | The App Association as Amicus Curiae, p. 11, *Apple, Inc. v. U.S.*, Case No. 15-565 (2015). The agency-sale approach gives independent app developers autonomy and flexibility in how they offer their apps to consumers, whether it be free with in-app purchases, subscription-based sales, one-time purchase, etc. *See* App Store Guidelines. Successful platforms, like Apple's iOS, have changed the app ecosystem by providing app developers with ubiquitous access to a broader swath of consumers and platform users. This scenario has led to a flourishing app economy that has greatly benefited our members. Chuck Jones, *Apple's App Store Generating Meaningful Revenue*, Forbes (Jan. 6, 2017, 2:10 PM), https://www.forbes.com/sites/chuckjones/2017/01/06/apples-app-store-generating-meaningful-revenue/#305d93011eb6 (reporting developers receiving $20 billion in revenue).

The Respondent's allegation that the Petitioner is making app developers set a price for the consumers who purchase their apps through the iOS platform is just not true. As an association that represents actual developers who rely on iOS, we find this characterization to be factually inaccurate and self-serving. App companies choose the distribution mechanism or platforms, choose the pricing, and even the monetization methodology for their applications. In fact, roughly 90 percent of apps made available on the iOS platform are free. Sarah Perez, *Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry*, TechCrunch (Jul. 18, 2013), https://techcrunch.com/2013/07/18/paid-apps-on-the-decline-90-of-ios-apps-are-free-up-from-80-84-during-2010-2012-says-flurry/. The Petitioner issues a 30 percent fee on apps that have an upfront cost or provide in-app purchases. In the context of a subscription, for each

year thereafter, the fee is lowered to 15 percent, yielding an 85 percent profit for the app developer. *See* App Store Guidelines. For that fee, our member companies benefit by reducing costs, including credit card collection record maintenance, third-party validation and other trust mechanisms, including hiring external publishers, and finally a trusted framework for consumers. In this case, the Respondent has effectually attempted to apply "old" economy principles without appreciating the complex and nuanced relationship between app developers and platforms.

The Respondent's attacks on the agency model is based on inaccurate information, and ignores the widespread benefits of app developers to app stores, and vice versa. Moreover, if the Respondent's suggestions are implemented it would create a utility-style regulation of pricing without action from Congress. This action would force app developers to absorb the costs of operating on the App Store, ultimately resulting in higher prices for consumers. The Respondent's course of action produces losers at each stage – both app developers who lose flexibility in their business models and may be forced to absorb the cost of higher fees, as well as consumers who are presented with fewer choices and higher prices of apps in the App Store marketplace.

II. The Ninth Circuit's Interpretation of the Functional Approach of the Direct Sellers Rule Inappropriately Conflates Digital and Traditional Retail Markets by Assuming Petitioner Has Property Rights in App Developers' Products

The Ninth Circuit's decision at issue before this Court radically expanded the eligible parties that may seek antitrust class action relief against digital commerce companies that utilize the agency sales approach by appearing to incorrectly assume that the Petitioner possessed a property right in an app developer's product. *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litigation)*, 846 F.3d 313 (9th Cir. 2017). Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). By virtue of the clause "any person," courts may apply the statute broadly. However, *Illinois Brick* limited that definition by only permitting courts to grant antitrust standing under Rule 12(b)(6) if the plaintiff is the direct purchaser of the company that overcharged as opposed to "others in the chain of manufacture or distribution." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977).

The essential question before the Ninth Circuit was whether the Respondent, when buying apps, was directly purchasing the app from the developer or the Petitioner. The court argued that because the Petitioner presented the final price and consumers could only purchase the app through the App Store, the Petitioner was the direct seller. In response, the Petitioner argued that it does not sell apps but rather sells "software distribution services"

to developers. *Pepper*, 846 F.3d at 323. The courts dismissed this claim, arguing that app developers do not have their own stores to sell their product. This is both technologically and factually inaccurate. The majority of our members have applications that run on multiple platforms, and with the advent of web-based applications, we have the opportunity to write for any device, regardless of platform or store.

The Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner incorrectly assumes the Petitioner possesses ownership rights in app developers' apps to get to its conclusion. This interpretation suggests that if the Petitioner owns rights to an app developer's app, then the app developer would not be entitled to any profit from the consumer. This is wholly inconsistent with the way in which the app developer and the Petitioner interact. Within this relationship, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee. Aside from this fee, the Petitioner has no ownership rights to the app. In addition, app developers are permitted provide their apps on platforms not owned by the Petitioner, unencumbered by the Petitioner. All creative rights solely belong to the app developer and are uninhibited by the Petitioner. Moreover, when a consumer signs a "terms of service" for each app he or she purchases, the app's developer maintains sole responsibility for any breach of those terms.

The district court accurately stated that the *Illinois Brick* decision requires a careful evaluation of whether a plaintiff is claiming a harm based on direct interactions or pass-through damages. Put another way, the court must evaluate who sets the price. This case challenges

the nature of the relationship between the app developer and the purchaser of the app. The App Association agrees with the district court's determination that "any injury to Plaintiffs is an indirect effect resulting from the [influence of Petitioner's commission on the] software developers' own costs," which could not be litigated without "speculat[ing] into developers' pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return."

CONCLUSION

For the aforementioned reasons, we respectfully ask the Court to grant the Petitioner's application for certiorari.

Dated: September 6, 2017

Respectfully submitted,

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